Petition

81-568

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF TEXAS,
Petitioner
vs.
LARRY MICHAEL MYERS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTION PRESENTED

Should this Court's decision in *Crist v. Bretz*, 437 U.S. 28, which held that jeopardy attaches in a jury trial as soon as the jury is sworn, be applied retroactively to a proceeding where no opening statements had been made or testimony given, and in which the state prosecutor, when he requested that the proceeding be terminated, specifically relied on 82 years of state authority holding that jeopardy had not yet attached in that proceeding, and so relied at a time when the Double Jeopardy Clause had not yet been made applicable to the states?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE STATE OF TEXAS,
Petitioner

vs.

LARRY MICHAEL MYERS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the Court of Criminal Appeals of Texas in the case of The State of Texas v. Larry Michael Myers, number 67,541 in the court below, which set aside Respondent's conviction for felony theft.

OPINION BELOW

The opinion of the Court of Criminal Appeals is reported at 618 S.W.2d 365 and is reproduced in the Appendix.

JURISDICTION

The Court of Criminal Appeals of Texas rendered its decision setting aside Respondent's conviction on June 17, 1981. Petitioner timely filed its motion for rehearing, accompanied by its motion for leave to file for rehearing as required by local rules. The court below denied the motion for leave to file for rehearing on July 22, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On October 23, 1968, a jury was empanelled and sworn to try Respondent for the offense of felony theft. Immediately after the jury was sworn in that day, it was dismissed for the evening, no opening statements having been made or testimony given. After the jury had left the courtroom, Respondent was arraigned on the indictment.

At the start of proceedings the next morning, the State asked for, and was granted, permission to withdraw its announcement of ready. This occurred because of an unforeseen change in the expected testimony of the victim, which prevented the prosecution from proceeding immediately with the case. The jury was then discharged, Respondent neither expressly consenting nor expressly objecting to that action. At the 1981 evidentiary hearing on the writ application, the prosecutor at the 1968 proceeding testified that he did not seek termination of the

proceeding until after he had researched the legal availability of that option.

Respondent never pled to the indictment in front of the 1968 jury.

On July 13, 1970, Respondent pled guilty to this charge of felony theft and was placed on probation for 10 years. In 1975 probation was revoked and Respondent sentenced to 10 years' confinement. At neither of these times was a double jeopardy claim raised, nor was it raised in the appeal of the revocation order. That revocation was affirmed in an unpublished per curiam opinion.

In 1980 Respondent filed an application for post-conviction relief under art. 11.07, TEX. CODE CRIM. PROC. ANN. The sole contention raised was that he had been twice placed in jeopardy as a result of the 1968 and 1970 proceedings. After an eventual evidentiary hearing at the trial court level, the Court of Criminal Appeals of Texas set aside the conviction. Its sole basis for decision was that *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978), was to be given retroactive effect. Since *Crist* held that jeopardy attached in a jury trial as soon as the jury was empanelled and sworn, Respondent had been twice placed in jeopardy, in violation of the United States Constitution. The court below said this result was required even though Texas had

since at least 1886 followed a different rule on the attachment of jeopardy.

REASONS FOR GRANTING THE WRIT

The Court of Criminal Appeals of Texas offered two grounds for its decision that *Crist* is to be applied retroactively: 1) that *Crist* did not announce "new and overruling" principles of law, and therefore presumably did not even trigger retroactivity analysis; and 2) that *Crist* should be applied retroactively in any event in light of *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). Petitioner believes the court below is incorrect in both its conclusions. Petitioner also believes the federal question presented is a significant one which this Court has not, but should, resolve.

I.

The Question Presented Involves A Significant Issue Which This Court Has Never Resolved, Which It Expressly Left Open In *Robinson v Neil, Supra,* And Which The Court Below Has Answered In The Negative: Whether Justifiable Reliance On Prior State Precedent And Practice

Will Ever Preclude Retroactive Application Of Nonprocedural Constitutional Decisions, Such As Those Under The Double Jeopardy Clause.

In cases involving "procedural rights and methods of conducting trials," this Court set out three factors which govern the retroactivity decision: 1) the purpose to be served by the new rule; 2) the extent of reliance by the appropriate authorities on the prior standard; and 3) the effect on the administration of criminal justice of the retroactive application of the new standards. *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030 22 L.Ed.2d 248 (1969).

However, in *Robinson v. Neil, supra,* this Court said that decisions not relating to procedural rules do not always lend themselves to the *Linkletter* analysis. *Robinson* involved the retroactivity of *Waller v.Florida,* 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), which had held that the "dual sovereignty doctrine" did not permit separate state and municipal prosecutions for the same criminal conduct. In *Robinson* the Court ultimately ruled in favor of retroactivity emphasizing the purpose of the Double Jeopardy Clause--to prevent subsequent

trials--and minimizing the reliance factor in that case.

However, the Court said that the reliance factor is not wholly absent in cases involving constitutional decisions not related to trial procedure. 409 U.S. at 509; 93 S.Ct. at 878. More importantly, it also said:

> We intimate no view as to what weight should be accorded to reliance by the State that was justifiable under the *Linkletter* test in determining retroactivity of a nonprocedural constitutional decision such as *Waller*.

409 U.S. at 510-11, 93 S.Ct. at 879. It seemed to indicate that in an appropriate case the purpose of the new rule could be weighed against the reasonable reliance of law enforcement officials on prior law and the prejudice to state interests if the decision were applied retroactively.

In spite of this language the court below gave no weight to the State's reliance on years of state precedent holding that jeopardy had not attached in Respondent's 1968 proceeding. Instead it addressed only the "purpose" factor in retroactivity analysis and in essence adopted a per se rule of retroactivity for this type of double jeopardy decision.

This cause, however, presents a compelling case for recognition of the reliance factor in double jeopardy retroactivity analysis.

A. The prosecution reasonably and in good faith relied on prior law holding that jeopardy had not attached in the 1968 proceeding.

The aborted trial in Respondent's case took place in 1968. As the court below noted in *McElwee v. State,* 589 S.W.2d 455, 458-59 n.4 (Tex. Crim. App. 1979), and as it briefly mentioned in this case, 618 S.W.2d at 368 n.8, Texas had for at least the previous 82 years followed the rule that jeopardy did not attach in a jury trial until the jury had been sworn *and* the accused had pled to the indictment in front of the jury. *See, e.g., Lockridge v. State,* 522 S.W.2d 526 (Tex. Crim. App. 1975); *Anderson v. State,* 24 Tex. App. 705, 7 S.W. 40 (1886). A mere pleading at an arraignment outside the jury's presence, which is all that occurred in Respondent's case, did not place a defendant in jeopardy. *Vardas v. State,* 518 S.W.2d 826 (Tex. Crim. App. 1975), *cert. denied,* 423 U.S. 904, 96 S.Ct. 206, 46 L.Ed.2d 135

(1975).[1] *Crist*, however, held that swearing in the jury was by itself sufficient to invoke jeopardy.

Significantly, the prosecutor in the 1968 proceeding testified at the evidentiary hearing on the writ application that he did not ask to withdraw the State's announcement of ready at that proceeding until after he had researched the permissibility of that action and had determined that it was a viable option. Obviously the State was relying on the then-accepted rule as to when jeopardy attached.

While it is true, as the court below notes, that *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), had *inferentially* held that in a federal trial jeopardy attached as soon as the jury was sworn, it is important to realize that *Downum* actually contained no discussion at all of when jeopardy attached. As is set out in detail in Justice Powell's dissent in *Crist* itself, *Downum* merely assumed *sub silentio* that jeopardy had attached, based on a concession in the brief of the government, and in any event the rule

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1. Language in *Vardas* concerning competency hearings was overruled in *Jackson v. State*, 548 S.W.2d 685 (Tex. Crim. App. 1977).

was thought to be only a supervisory one for the federal courts. 437 U.S. at 48 n.14., 98 S.Ct. at 2167-68 n.14.

Finally, the Double Jeopardy Clause was not made applicable to the states until 1969 in *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Even then only those double jeopardy holdings of constitutional dimension would have become applicable to the states. Decisions based on this Court's supervisory powers over the federal courts would not have been binding on them.

It would have taken great prescience indeed for the state prosecutor in 1968 to realize that he should take into account a *sub silentio* decision of this Court made five years earlier, which was not then thought to be of constitutional magnitude, and which in any event would not have been arguably applicable to the states until several months after the 1968 proceeding in question here. A stronger case of reliance on existing law and practice would be difficult to imagine.

Indeed, after *Benton* and before *Crist* this Court considered only a single state prosecution involving the attachment of jeopardy issue, *Illinois v. Somerville,* 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973), and as *Crist* itself notes, 437 U.S. at 38, 98 S.Ct. at 2162, it simply

assumed the applicability of the federal standard. In fact, the Illinois and federal rules on the attachment of jeopardy were the same. *See People v. Grevan,* 23 Ill.App.3d 997, 320 N.E.2d 476 (Ct. App. 1974). Also, a rule on attachment similar to that used in Texas was also followed not only in Montana (*Crist*), but at least in Arizona and New York as well. See *Crist v. Bretz,* 437 U.S. at 29 n.1, 98 S.Ct. at 2157 n.1; *McElwee v. State,* 589 S.W.2d at 457.

Thus when *Crist* itself was decided, three members of this Court found the decision a startling one, saying that the rule had no historical basis, that the Montana rule was fully compatible with the "central concerns" of the Double Jeopardy Clause, and that the majority's rule was in effect imposing a supervisory rule on the states. 437 U.S. at 39-53, 98 S.Ct. at 2163-70 (dissenting opinions).

All of this of course is not to attack the correctness of *Crist,* but merely to show the reasonable reliance of state prosecutors on a contrary rule and the inadvisability of according no weight to such reliance.

B. There is confusion in the state and federal courts over the meaning of *Robinson v. Neil, supra,* and the

applicability of the reliance factor to double jeopardy retroactivity analysis.

The only other court to consider the retroactivity of *Crist* has held it retroactive in light of *Robinson*, applying with almost no analysis a per se rule of retroactivity in this area. *Mizell v. Attorney General of State of New York*, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, 440 U.S. 967, 99 S.Ct. 1519, 59 L.Ed.2d 783 (1979). Other courts considering double jeopardy retroactivity analysis involving the prohibition of another trial, as opposed to procedural restrictions stopping short of a total bar to a retrial, have also tended to establish a per se rule of retroactivity, even though *Robinson* said the retroactivity result was not an ironclad one. 409 U.S. at 509, 93 S.Ct. at 878. This has occurred in the *Burks--Greene* insufficient evidence area, *infra*, as in *Ex parte Reynolds*, 588 S.W.2d 900 (Tex. Crim. App. 1979), *cert. denied*, 445 U.S. 920, 100 S.Ct. 1284, 63 L.Ed.2d 605 (1980) and *Bullard v. Estelle*, 502 F.Supp. 887 (N.D. Tex. 1980).

In *Holt v. Black*, 550 F.2d 1061 (6th Cir. 1977), *cert. denied*, 432 U.S. 910, 97 S.Ct. 2960, 53 L.Ed.2d 1084 (1977), the court said that *Robinson* compelled retroactive application of *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975), which held that the Double Jeopardy

Clause prohibits the trial of a juvenile as an adult where an adjudication hearing has already been conducted in juvenile court which resulted in his being "sentenced" to trial as an adult.

However, a contrary reading of *Robinson* (as it applied to *Breed*) was reached in *Jackson v. Justices of Superior Court of Massachusetts,* 549 F.2d 215 (1st Cir. 1977), *cert. denied,* 430 U.S. 975, 97 S.Ct. 1666-67, 52 L.Ed.2d 370 (1977). The First Circuit rejected a per se approach to double jeopardy retroactivity after *Robinson,* and instead applied more traditional *Linkletter* analysis, with its greater emphasis on the reliance factor. Ultimately the First Circuit denied retroactivity.

Given this contrariety of views as to the meaning of *Robinson,* and in light of the fact that *Robinson* expressly left open the question of whether reliance is ever to be a factor in nonprocedural double jeopardy retroactivity analysis, Petitioner urges this Court to take this opportunity to settle this disagreement.

C. When the reliance by the prosecution on prior state precedent and the prejudice to the State resulting from retroactive application of *Crist* are weighed in

with the purpose of the Double Jeopardy Clause, only prospective application of *Crist* would be called for.

Even assuming the Double Jeopardy Clause's purpose of preventing any trial were the primary criterion for resolution of this case, Petitioner does not believe that purpose would be served here by applying *Crist* retroactively. As the court below noted, most double jeopardy cases involve situations in which the prosecution is trying to get a "second bite at the apple" in the sense of putting its evidence on a second time after having offered all or part of its evidence in a previous proceeding. This was certainly the case in the "insufficient evidence cases," *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), and the court below placed great reliance on its own decisions applying those two cases retroactively, *see, e.g., Ex parte Reynolds, supra,* for its resolution of the current question. This type of "second bite" analogy also holds true for the only Supreme Court cases actually holding double jeopardy decisions retroactive. *Robinson v. Neil, supra; North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 1191 n.1, 25 L.Ed.2d 469

(1970).[2]

In Respondent's case, though, the State had not presented any evidence at all, nor had it even made an opening statement. Thus the chance for prosecutorial overreaching through its opening statement or through its initial presentation of evidence--important factors in both the concurring and dissenting opinions in *Crist*--are absent here. What is presented is simply a situation where the State never had a chance to present its case to the jury because a key witness unexpectedly waivered in his anticipated testimony, causing the prosecutor to realize that he needed to regroup before proceeding. Though the accused has a right to be free from improper multiple prosecutions, the State also has a weighty interest in getting its evidence before the trier of fact at least once. *Burks, supra.* This state interest militates against applying *Crist* retroactively.

Again, this is why the reliance factor is so important here. First, had the prosecution realized it could not rely on state rules on

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2. As this Court noted in *Robinson*, 409 U.S. at 508-09, 93 S.Ct. at 878, *Pearce* and *Ashe* were not "fully reasoned" retroactivity decisions and do not directly control retroactivity questions in other contexts.

when jeopardy attached, it could have sought a continuance or postponement rather than a termination of the proceeding. Secondly, what the State relied on in 1968 when it withdrew its announcement of ready was that under existing law it could still get a full trial *in this case*. While the court below minimized the reliance factor in its *Burks--Greene* retroactivity cases, what it said the State had arguably given up there in reliance on state practice was the chance to try the defendant on *other* charges. *Ex parte Reynolds,* 588 S.W.2d at 904. Such is not the case here. The State thought it had a right to try this case.

Similarly, although the *Robinson* retroactivity decision prevented Florida from punishing the defendant for the state violation it thought it could prosecute, it at least was able to obtain some vindication for the violation of the law through the municipal prosecution. The guilty defendant did not simply go scot-free, as he will here.

While none of these considerations are meant to say that *Crist* itself was wrongly decided, they do present weighty interests leading to the conclusion that going further and making *Crist* retroactive would not be good policy. While it may appear unusual that one prisoner, such as Bretz, will benefit from a new rule while another, such as Respondent, will not, this seeming anomaly has been

explained in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967).

Consequently Petitioner believes this Court should grant full review of this case so that it may address the viability of the reliance factor in double jeopardy retroactivity analysis and determine how that factor is to be weighed in the circumstances of this case.

II.

The Question Presented Involves A Second Issue, The Applicable Cases Being In Conflict, Concerning The Test For Determining If A Particular Decision States A "New Rule" For Retroactivity Purposes, And Whether The Promulgation Of Such A "New Rule" Is A Threshold Question Controlling Whether Retroactivity Analysis Is Even Called Into Play, Or Is Simply A Factor Subsumed Within The Reliance Element Of Such Analysis.

The court below made the statement that *Crist* did not establish "new and over-

ruling principles of law," the apparent legal consequence of this being that formal retroactivity analysis would not even be called into play.

A. Formulation of the test

This Court's cases express various "tests" determining if a particular decision is a new one for retroactivity purposes. In the criminal area, the Court said in *Desist v. United States, supra,* that a decision is a new one for such purposes if it represents a "clear break with the past." 394 U.S. at 248, 89 S.Ct. at 1033. *Robinson v. Neil* used a similar phraseology, speaking of a "departure from past decisions." 409 U.S. at 410, 93 S.Ct. at 879. Justice Stewart offered a more elaborate statement in his dissent in *Milton v. Wainwright,* 407 U.S. 371, 381 and n.2, 92 S.Ct. 2174, 2180 and n.2, 33 L.Ed.2d 1 (1972), suggesting two similar versions of the test. One formulation concerned whether the decision marked a new departure in the law, upset accepted prosecutorial practice, or would effect wholesale jail deliveries. Put another way, he said a "new rule" is one which marks a sharp break in the web of the law in that it: 1) overrules clear past precedent or 2) disrupts a practice long accepted and widely relied upon.

The civil decisions are equally divergent. A new principle of law has been said to be one which either overrules clear past precedent on which litigants relied, or decides an issue of first impression whose resolution was not clearly foreshadowed. *Chevron Oil Company v. Huson*, 404 U.S. 97, 107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). *Accord: Allen v. State Board of Elections*, 393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969). Yet the Court also said a new rule involves an "abrupt and fundamental shift in doctrine" that constitutes a "sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 498-99, 88 S.Ct. 2224, 2234, 20 L.Ed.2d 1231 (1968). Furthermore, *Desist* said a decision could be a new one *even though* the ruling might have been clearly foreshadowed. 394 U.S. at 248, 89 S.Ct. at 1033.

B. Whether the test is a threshold issue

Desist v. United States viewed the "new rule" question as something that had to be addressed as a prerequisite to formal retroactivity analysis since only after finding the decision at issue a new one did it move on to its *Linkletter* analysis.

Justice Stewart, in his *Milton v. Wainwright dissent,* again clearly saw the issue as a threshold inquiry. *Accord: Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra.* However, in *Michigan v. Payne,* 412 U.S. 47, 56, 93 S.Ct. 1966, 1971, 36 L.Ed.2d 736 (1973), the matter seemed just as clearly to be consigned to mere consideration within the reliance factor analysis. *Accord: Chevron Oil Company v. Huson, supra.* In *Robinson v. Neil* the placement of the issue is even less clear, the Court apparently making no attempt to define whether the considerations are at all distinct.

C. Nature of the prior decisions which may be looked to when determining the "newness" of a Supreme Court decision

Michigan v. Payne and *Desist v. United States* indicated that prior decisions of this Court *and* of the lower state and federal courts would be considered in determining this question. *Accord: United States v. Peltier,* 422 U.S. 531, 541-42, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1975). Yet *Hanover, supra,* seemed to limit consideration to prior Supreme Court authority only. *Robinson v. Neil* again charts a middle course, possibly giving some small weight to contrary lower court authority.

All of this has caused confusion among the lower courts, as shown, for example, by *Jackson v. Justices of Superior Court of Massachusetts, supra,* and the lower court decision in *United States v. Peltier,* 500 F.2d 985 (9th Cir. 1974). Moreover, had the court below understood these decisions, it would, in Petitioner's view, have concluded that *Crist* was a "new decision" in that it "disrupted a practice long accepted and widely relied on," *Michigan v. Payne, supra,* or at least involved an issue of first impression about which there could have been a rational disagreement. *Allen v. State Board of Elections, supra.*

CONCLUSION

Because of these many areas of uncertainty in retroactivity analysis, especially where nonprocedural constitutional decisions are at issue, Petitioner believes this Court should take this opportunity to clarify these matter for the lower courts, and ultimately to correct the error in the decision below. Consequently Petitioner asks that a writ of certiorari issue to review the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

L.T. WILSON, Assistant
Criminal District Attorney
Chief of the Criminal Division

C. CHRIS MARSHALL, Assistant
Criminal District Attorney
Chief of the Appellate Section
COUNSEL OF RECORD

C. CHRIS MARSHALL

Criminal Justice Building
200 West Belknap
Fort Worth, Texas 76102
817/334-1688

Attorneys for the Petitioner

APPENDIX

Opinion of the Court of Criminal Appeals
of Texas

EX PARTE LARRY MICHAEL MYERS — Habeas Corpus Application

- - - -

NO. 67,541 — From TARRANT County

O P I N I O N

In this postconviction application for writ of habeas corpus pursuant to Article 11.07, V.A.C.C.P., petitioner is armed with federal and state jeopardy provisions in assailing a 1970 conviction for theft in Cause No. 75372 in the trial court. On an earlier day the Court entered an order directing the habeas court to hold an evidentiary hearing to allow petitioner an opportunity more fully to develop the facts concerning his allegation. In that order we described the posture of the matter, viz:

> "Petitioner was placed on 10 years probation for theft over $50.00 in 1970. In 1975, his probation was revoked and his conviction upheld on appeal by this

> Court's per curiam opinion No. 52,730.
>
> Petitioner alleges that as a jury was impaneled and sworn in 1968, prior to the State's 'withdrawing its announcement of ready,' his subsequent conviction in 1970 was barred by jeopardy. Specifically, petitioner asks this Court to hold the Supreme Court's decision in Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d (1978), retroactive; an issue withheld by this Court in McElwee v. State, 589 S.W.2d 455 (1979)."

The record now before us consists of the transcript and transcription of the notes of the court reporter taken October 23, and 24, 1968 in Cause No. 75372 and the transcription of notes taken at the evidentiary hearing ordered by this Court. Concluding the latter hearing, the habeas court made the following findings of fact with respect to the trial that had been aborted October 24:

> [1]: On October 23, 1968, the jury was empaneled and sworn in this cause, that is number 75372. After the jury was sworn, the members of the jury were excused for the day and they left the courtroom. Petitioner was then arraigned on the charge out of the jury's presence, and he entered a plea of guilty.

> [2]: On October 24, 1968, the State was permitted to withdraw its announcement of ready in the case because of an unforeseen change in the expected testimony of the State's key witness, the victim. The jury was then discharged. The Petitioner did not expressly object to the discharge of the jury, nor did he expressly consent to its discharge.
>
> [3] Petitioner never plead to the indictment in front of the jury in 1968."[1]

These findings are supported by the

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1. The court further found, and it is undisputed, that never thereafter - from the plea hearing in 1970 through the revocation hearing in 1975 to affirmance of his conviction by the Court - did petitioner suggest there was a jeopardy problem in his case. Nevertheless, it is settled in this Court that that kind of silence does not amount to waiver that bars a subsequently raised claim of double jeopardy. Ex parte Jewel, 535 S.W.2d 362 (Tex. Cr. App. 1976); see Ex parte Scelles, 511 S.W.2d 300 (Tex. Cr. App. 1974). The State commendably notes this state of the law, and it expressly eschews a waiver argument.

record,[2] and they form the backdrop for our determination of the principal issue in this proceeding.

Today is the "another day" reserved in McElwee v. State, 589 S.W.2d 455 (Tex. Cr. App. 1979) to express our view "whether Crist [v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978) is retroactive to those convictions which became final prior to

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2. We also note the following docket entries:

> Jury selected
> "10-23-68 Arraigned - PN.G --
> 10-24-68 - State Withdrew announcement of ready --"

On October 24, 1968, the trial judge explained to the sitting jury, in pertinent part:

> ". . .The State announced ready yesterday. One of their witnesses was not present at the time. When the witness did not show up this morning he was not a witness as they thought. He was not willing or couldn't testify to the facts that they thought he could testify that the case would demand in the way of investigation.
>
> I am permitting the State to withdraw their announcement of ready in this case. * * *"

the decision," McElwee, supra, at 460.[3]

The starting place is, of course, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); it overruled a thirty year landmark case[4] and found "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment," 395 U.S. at 794. Application of that finding to North Carolina[5] the same day, moreover, left "no doubt of the 'retroactivity' of the Court's decision in Benton v. Maryland," Ashe v. Swenson, 397 U.S. 436, 437 n. 1, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

In overturning Palko the Supreme Court pointed out that in an increasing number

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3. Earlier, in Ex parte Reynolds, 588 S.W. 2d 900, 904 (Tex. Cr. App. 1979), we also held the question open.

4. Palko v. Connecticut, 302 U.S. 319 (1937).

5. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

of cases it "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights...'," quoting from Malloy v. Hogan, 378 U.S. 1, 10-11 (1969), Benton v. Maryland, supra, 395 U.S. at 794. Rather, the Court pointed out its recent insistence that specific guarantees of the Bill of Rights be looked to in order "'to determine whether a state criminal trial was conducted with due process of law,' Washington v. Texas, 388 U.S. 14, 18 (1967)," ibid. So, the Court concluded in this vein,

> ". . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' Duncan v. Louisiana, [391 U.S. 145] supra, at 149 [88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)] the same constitutional standards apply against both the State and Federal Governments."[6]

Thus, the Court stated, "The validity of petitioner's larceny conviction must be judged, not by the watered-down standard enunciated in Palko, but by the Court's

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6. All emphasis is added throughout by the writer of this opinion unless other wise indicated.

interpretations of the Fifth Amendment double jeopardy provision," id., at 796.

Now backtracking to Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963) - decided five years prior to the remarkably similar predicament in which the State here found itself.[7] Then, according to the Supreme Court in Crist v. Bretz, supra, 437 U.S. at 35, "the precise point at which jeopardy does attach in a jury trial might have been open to argument before this Court's decision in Downum v. United States," supra; however, continued the Court:

> ". . .There the second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial when jeopardy attaches, and the Downum case has since been understood as the explicit authority for the proposition that

---

7. In Downum when the case was called for trial both sides announced ready and a jury was selected and sworn, only for the Government to learn that a principal witness was absent; before any testimony was taken, however, the jury was discharged.

> jeopardy attaches when the jury is empaneled and sworn. [citing authorities]."[8]

Accordingly, the Court in Crist easily found that "the defendant's valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy, id., at 36. Similarly, it rejected the "view" of the State of Montana as to when jeopardy attaches - not until the first witness is sworn - as "impermissible," because:

> "We agree with the Court of Appeals that the time when jeopardy attaches in a jury trial 'serves as the lynchpen for all double jeopardy jurisprudence.' * * * Today we

---

8. Such was seen to be the meaning of jeopardy by Mr. Cooley in writing that with respect to an accused a jury "has been charged with his deliverance...when they have been impaneled and sworn," Cooley's Const. Lim. (15th Ed.) 404. Ironically, this Court discovered in McElwee v. State, supra, at 458, that a similar rule obtained in Texas, see Powell v. State, 17 Cr.R. 345 (Ct. Ap. 1884), until conventional wisdom accepted the notion that additionally the plea of the accused to the indictment must be heard, see McElwee, at 458-459, and n.4.

> explicitly hold what [Illinois v.] Somerville [410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973)] assumed: The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."

Essentially what we are called on to do in these kinds of situations is to exercise our best judgment in predicting whether, if and when the Supreme Court of the United States determines to do so, it will decide that the rule of Crist is entitled to retroactive application in state criminal proceedings. Informed by such recent exercises as Ex parte Reynolds, 588 S.W.2d 900 (Tex. Cr. App. 1979) cert. denied, 445 U.S. 920 (1980) and Ex parte Mixon, 583 S.W.2d 378 (Tex. Cr. App. 1979) cert. denied, 445 U.S. 919 (1980), we are satisfied that Crist is to be given retroactive application, for two reasons.

First, a formulation that combines Downum's closing the argument concerning attachment of jeopardy in a jury trial in 1963 with Benton's imposing retroactively the same constitutional standards against both State and Federal Governments in 1969, amounts to a recipe by the Supreme Court to be followed once a Crist factual situation arose. In this light Crist did not

establish "new and overruling principles of law," Mizell v. Attorney General of the State of New York, 586 F.2d 942, 946 (CA 2, 1978), cert denied, 440 U.S. 967 (1979).

Secondly, there is the significant difference enunciated in Robinson v. Neil, 409 U.S. 505, 508-509, 93 S.Ct. 876, 878, 35 L.Ed.2d (1973) between the relative values of the guarantee against double jeopardy and procedural guarantees. As this Court perceived it in Ex parte Reynolds, supra, at 903, jeopardy decisions are "squarely directed to the prevention of the second trial's taking place at all," rather than to prescribe procedural rules that govern the conduct of a trial. Just as the decision in Crist mandated that Montana not subject Bretz and Cline to a retrial, so it prevents a second state trial of any accused similarly situated.

We hold that Crist is retroactive to those convictions which became final prior to the decision by the Supreme Court. We further find the circumstances that troubled the prosecuting attorneys in the case at bar do not amount to "manifest necessity" for a retrial. Downum, supra; see Hipple v. State, 80 Tex.Cr.R. 531, 191 S.W. 1151 (1917).

Accordingly, the writ is granted, the conviction in Cause No. 75372 is vacated and

set aside and the indictment in that cause is dismissed. Therefore, petitioner is released from custody and every manner of restraint in his personal liberty as a consequence of the conviction. The Clerk of this Court is directed to forward a copy of this opinion to the Texas Department of Corrections.

It is so ordered.

CLINTON, Judge

(Delivered June 17, 1981)

EN BANC

Onion, P.J., Dally, J. and McCormick, J. concur in result.

Findings of Fact at the Evidentiary Hearing,
As Dictated to the Court Reporter

NO. C-1-477

EX PARTE	I	IN THE CRIMINAL DISTRICT
	I	COURT NO. 1
LARRY MICHAEL MYERS	I	TARRANT COUNTY, TEXAS

BE IT REMEMBERED that on the 5th day of February, A.D. 1981, Application for Writ of Habeas Corpus in the above entitled and numbered cause came on to be heard before the Honorable Byron Matthews, and the following proceedings were had, to wit:

APPEARANCES:

For the Petitioner:

Mr. Bill Magnussen
Attorney at Law
W.T. Waggoner Building
Fort Worth, Texas 76102

For the Respondent:

Mr. M. Eugene Grant, Jr.,
Mr. C. Chris Marshall
Assistant District Attorneys
Criminal Justice Building
Fort Worth, Texas 76102

[2]

. . . .

THE COURT: . . . .

As to this hearing, I'll make the Findings of Fact and Conclusions of Law. As directed by the Court of Criminal Appeals, this court held an Evidentiary Hearing on February the 5th, 1981, concerning the factual issues raised by Petitioner's Application for Post-Conviction Relief from his 1970 conviction for Theft Over Fifty Dollars in cause number 75372, The State of Texas versus Larry Michael Myers, in Criminal District Court Number One of Tarrant County, Texas. The Court now enters its

[30]

Findings of Facts based on that hearing:

Paragraph one: On October the 23rd, 1968, the jury was empaneled and sworn in this cause, that is number 75372. After the jury was sworn, the members of the jury were excused for the day and they left the courtroom. Petitioner was then arraigned on the charge out of the jury's presence, and he entered a plea of not guilty.

Paragraph two: On October 24, 1968, the State was permitted to withdraw its announcement of ready in the case because of an unforeseen change in the expected testimony of the State's key witness, the victim. The jury was then discharged. The Petitioner did not expressly object to the discharge of the jury, nor did he expressly consent to its discharge.

Paragraph three: Petitioner never plead [sic] to the indictment in front of the jury in 1968.

Paragraph four: On July 13, 1970, Petitioner plead [sic] guilty to this charge and was placed on ten years probation. At that time, he did not raise any claim of prior jeopardy or make any complaint of an improper discharge of the jury in 1968.

[31]

On June 12th, 1975, Petitioner's probation in cause number 75372 was revoked and he was sentenced to ten years' confinement. At that hearing, he again did not raise any claim if [sic] prior jeopardy or make any complaint of an improper discharge of the jury in 1968, nor did he raise such claim on his appeal from the revocation.

Signed and entered on this the 5th day of February, 1981.

MR. MARSHALL: Thank you, Your Honor.

THE COURT: Any objections to that counsel, as it was dictated into the record?

MR. MAGNUSSEN: May I talk to him just a second?

[There is a pause in the proceedings.]

MR. MAGNUSSEN: Your Honor, we have no objections to it at this time.

THE COURT: All right. May be admitted into evidence, that is, the record will be filed. It would have been filed anyway.

[The hearing is concluded.]

[32]

Judgment and Mandate of the Court of Criminal Appeals, Including Order Regarding the State's Motion for Rehearing

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TRIAL COURT NO. C-1-477

THE STATE OF TEXAS

To the CRIMINAL DISTRICT COURT NO. 1 OF TARRANT County, Greeting:

Before our Court Of Criminal Appeals, on the 22nd day of July A.D. 1981, the cause upon appeal to revise or reverse your judgment between

EX PARTE: LARRY MICHAEL MYERS Appellant

NO. 67,541

VS.

THE STATE OF TEXAS, Appellee,

was determined, and therein our said Court Of Criminal Appeals made its order in these words:

"This cause came to be heard on the Application for Writ of Habeas Corpus, and the same being considered, because it is the Opinion of this Court that the relief prayed for should be Granted, it is ORDERED, ADJUDGED and DECREED that said Relief is in all things GRANTED, in accordance with the opinion of this Court and that this decision be certified below for observance."

The Motion for Leave to File State's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the order of our said Court Of Criminal Appeals, in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said Court Of Criminal Appeals, with the Seal thereof annexed, at the City of Austin, this the 24th day of July, A.D. 1981.

THOMAS LOWE
Clerk

/s/ Belva Myler
Deputy Clerk

Respondent's Application for Post-Conviction Relief (Excluding Attachments)

NO. C-1-477
(75372)

EX PARTE	I	IN THE CRIMINAL DISTRICT
	I	COURT NO. 1
LARRY MICHAEL MYERS	I	TARRANT COUNTY, TEXAS

ORIGINAL APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Larry Michael Myers, Applicant-petitioner herein, and respectfully moves the court to issue a writ of habeas corpus for post-conviction relief pursuant to Article 11.07, Vernon's Annotated Texas Code of Criminal Procedure and Article I, Section 12, of the Texas Constitution, and in support hereof petitioner will show the honorable court the following:

I.

Petitioner is illegally confined and restrained in his liberty at the Walls Unit of the Texas Department of Corrections, in Huntsville, Texas, by the Honorable W.J. Estelle, Jr., Director of said institution.

II.

Petitioner's confinement is by virtue of a final judgment conviction of the Criminal District Court No. 1 of Tarrant County, Texas, issued in Cause No. 75372, on July 13, 1970. Trial was before the court without a jury upon petitioner's plea of guilty to the alleged offense of "Theft of property of the value of $50.00 or over." Petitioner was placed on probation for ten (10) years and said probation was subsequently revoked on June 3, 1975 and sentenced to prison for "Not less than two (2) years nor more than ten (10) years."

III.

Certified copies of (1) the indictment, (2) judgment on plea of guilty and order of probation, (3) order revoking probation and sentence and (4) the Court's Docket sheet and orders in this Cause.

IV.

The sole ground upon which petitioner's unlawful custody is alleged is as follows:

Petitioner was subjected to double-jeopardy in that he was put upon trial a second time for the same alleged offense after a jury had been selected and sworn and the trial court declared a mistrial on motion by the State in the absence of manifest necessity.

V.

Petitioner was indicted in this cause on March 19, 1968, charging the offense of theft of "one automobile of the value of over fifty dollars" on September 29th., 1967. Petitioner was brought to trial on October 23rd., 1968; jury was selected and sworn; petitioner was arraigned and entered his plea of not guilty. The following day the State withdrew announcement of ready and the court "passed for the State." (See docket sheets annexed herewith). On July 13, 1970, the petitioner was brought back into court and entered a plea of guilty before the court without a jury. Imposition of sentence was suspended and petitioner was placed on probation for ten (1) [sic] years. On June 3, 1975 the court entered an order revoking probation and petitioner was sentenced to ten (10) years imprisonment.

VI.

The Texas Court of Criminal Appeals has long held that a criminal defendant has been placed in jeopardy once a jury has been selected and sworn and the defendant pleads to

the indictment. Lockridge v. State, 522 S.W.2d 526 (Tex. Cr. App. 1975); Vardas v. State, 518 S.W.2d 826 (Tex. Cr. 1975) and numerous cases cited therein. Petitioner contends that when he appeared for trial on October 23, 1968 and a jury was selected and sworn; and petitioner pled to the indictment; he was thereupon placed in legal jeopardy. The second trial commencing on July 13, 1970 - nearly two (2) years later - placed petitioner in jeopardy a second time for the same alleged offense. Such procedure violates petitioner's rights provided by the 5th and 14th Amendments of the United States Constitution; Article I, Sections 10, 12, 14, and 19 of the Texas Constitution; Articles 1.05 and 1.10, V.A.C.C.P. Accordingly, the judgment and sentence heretofore rendered against petitioner in Cause No. 75372 should be set aside and dismissed.

VII.

WHEREFORE, Petitioner Larry Michael Myers, prays this honorable court will issue the writ in this Cause; will make finding of facts and conclusion of law; and will recommend to the Texas Court of Criminal Appeals that the judgment and sentence heretofore rendered against petitioner in Cause No. 75372 should be set aside and the Cause dismissed. Petitioner prays this relief will be granted.

Respectfully Submitted,

/s/Larry Michael Myers

Larry Michael Myers,
Petitioner
P.O. Box 32 -250806
Huntsville, Texas 77340

THE STATE OF TEXAS)

COUNTY OF WALKER)

AFFIDAVIT

BEFORE ME, the undersigned authority, appeared Larry Michael Myers, on this the 11 day of August, 1980, and who being duly sworn did depose and state on his oath the following:

I, Larry Michael Myers, am the petitioner in the proceeding to which this attached; and I hereby state under oath that the foregoing allegations in the Application for writ of habeas corpus are true and correct.

/s/Larry Michael Myers
Larry Michael Myers,
Affiant
P. O. Box 32 - 250806
Huntsville, Texas 77340

SWORN AND SUBSCRIBED to be true and correct by Larry Michael Myers before me on this the 11 day of August, 1980.

/s/ Thomas C. Hulo
Notary Public In and For
Walker County, Texas

Opposition

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

* * * * * * * * * * * * * * * *

NO. 81-568

THE STATE OF TEXAS,

Petitioner

VS

LARRY MICHAEL MYERS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

BRIEF OF RESPONDENT ON JURISDICTION

LARRY MICHAEL MYERS, Pro Se
Rt. 2, Box 2575A
Spanaway, Washington 98387

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PREFACE

The Petitioner, C. Chris Marshall, Assistant Criminal District Attorney for Tarrant County, Texas, is the party representing the State of Texas and who was the Respondent to the original application for writ of habeas corpus that was granted by the Texas Court of Criminal Appeals. In this brief the parties will be referred to as they appear before this Court. Pursuant to Rule 34 of the United States Supreme Court, the Respondent accepts the statement of the case, the opinion below, Constitutional and Statutory provisions involved, and the questions presented for review as stated by the Petitioner.

REASONS FOR DENYING THE WRIT

The Petitioner seeks to invoke the Certiorari jurisdiction of this Court pursuant to Title 28, U.S.C., Section 1254(1). The Court has determined that this "extraordinary" writ will be granted only when there are special and important reasons therefor. Rule 17; Fay v. Noia, 372 U.S. 391 (1963). This case fails to satisfy any of the criteria the court has established for invoking its jurisdiction. Only a minuscule number of defendants in Texas can be effected by it. The issue presents no conflict of precedent and is, in fact, consistent with this Court's decisions in Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969); Ashe v. Swenson, 397 U.S. 436, 437 n. 1, 90 S.Ct. 1189 (1970); Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963) and Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978).

The Texas Court of Criminal Appeals' formulation which combines Downum's attachment of jeopardy in 1963 with Benton imposing retroactively the same constitutional standards against both State and Federal Governments in 1969, being a "recipe" by the Supreme Court to be followed once a Crist factual situation arose, is hereby adopted by the Respondent. In light of Crist, supra, the Court did not establish "new and overruling principles of law," Mizell v. Attorney General of the State of New York, 586 F.2d 942 (CA 2, 1978), cert. denied 440 U.S. 967 (1979).

The decision of the Texas Court of Criminal Appeals, by the Honorable Justice Sam Houston Clinton, is eminently correct and sound, and certiorari should be denied.

CONCLUSION

This case involves no important question of Federal law. The decision of the Texas Court of Criminal Appeals creates no conflict of precedent whatsoever. It is, in fact, consistent with this Court's decisions cited in the opinion by the Court of Criminal Appeals. There are no special or important reasons to disturb the decision by the Texas Court of Criminal Appeals below. This court's writ of certiorari should not issue.

RESPECTFULLY SUBMITTED

Larry Myers

Larry Michael Myers, Pro Se
Rt. 2, Box 2575A
Spanaway, Washington 98387

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing response to Petition for writ of certiorari has been served by mailing same, postage prepaid, to Mr. C. Chris Marshall, Assistant District Attorney for Tarrant County, Texas, 200 West Belknap, Fort Worth, Texas 76102, on this the 12 day of Nov, 1981, and that all parties required to be served have been served.

Larry Michael Myers

Larry Michael Myers
Rt. 2, Box 2575A
Spanaway, Washington 98387

Ag 3 Nov 25

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

* * * * * * * * * * * * * *

NO. 81-568

THE STATE OF TEXAS,

Petitioner

VS

LARRY MICHAEL MYERS,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 45 of the Rules of this Court, Motion is hereby made that the Respondent be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit. Leave to proceed in forma pauperis has been sought in the Court below and granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the Office of Criminal District Attorney for Tarrant County, Texas at 200 West Belknap, Fort Worth, Texas 76102, on this the 12 day of Nov, 1981.

RESPECTFULLY SUBMITTED

Larry Myers

Larry Michael Myers, REspondent
Rt. 2, Box 2575A
Spanaway, Washington 98387

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

* * * * * * * * * * * * * * *

NO. 81-568

THE STATE OF TEXAS,
Petitioner

VS

LARRY MICHAEL MYERS,
Respondent

A F F I D A V I T

I, Larry Michael Myers, being first duly sworn according to law, depose and say, in support of my Motion for Leave to proceed without being required to prepay costs or fees:

(1). I am the Respondent in the above entitled case.

(2). I was recently released from prison on parole and have no means of obtaining money to pay the costs or fees involved in this case initiated in this court by the Petitioner.

(3). I have no savings and because of my poverty I am unable to pay the costs of this cause.

(4). I am unable to give security for the same.

(5). I believe I am entitled to the redress I seek in said case.

(6). The nature of this case is briefly stated as follows:

On October 23, 1968, I was placed on trial for the alleged offense of "theft." On this date a jury was selected and sworn to try the case upon my plea of Not Guilty. The following day, on motion by the state, the jury was dismissed because a witness for the prosecution was not available. Nearly two (2) years later, on July 13, 1970, the Attorney representing me called me and told me to meet him at the courthouse; that they were going to try me on the theft charge and for me to plead guilty and I would be given Probation. I did this and was given Probation. In 1975 Probation was revoked and I was sentenced to ten (10) years imprisonment. In 1980, I filed an application for writ of habeas corpus, claiming I had been subjected to Double Jeopardy in violation of the Constitution of the United States. The State's highest court granted the

writ of habeas corpus and ordered the cause dismissed. Subsequently, the Respondent filed for this Court's review in a petition for writ of certiorari to which I now must file a response.

Larry Michael Myers

Larry Michael Myers, Affiant
Rt. 2, Box 2575A
Spanaway, Washington 98387

STATE OF WASHINGTON)
)
COUNTY OF Pierce)

Duly witnessed and sworn to before me, NOTARY PUBLIC, on this 17th day of Nov, 1981.

Michael D. Beckham

NOTARY PUBLIC IN AND FOR
Pierce COUNTY, WASHINGTON

Supreme Court of the United States

No. 81-568

Texas,

Petitioner

v.

Larry Michael Myers

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Texas, No. 67,541.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Criminal Appeals of Texas.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

November 30, 1981